

**OPINION
69-33**

April 24, 1969 (OPINION)

Mr. R. G. Nerison

Assistant City Attorney

City of Jamestown

RE: Cities - Appeal From Municipal Court - Forfeiture of Bail

This is in response to your letter in which you recite that recently two defendants were convicted in a municipal court of the City of Jamestown. As permitted by law (section 33-12-34) the defendants appealed to district court and posted bail as provided for in section 33-12-36. The defendants were given notice of the time and place of trial but failed to appear. In accordance with section 33-12-41 the judgment was summarily affirmed.

We should note that the appeal to the district court pursuant to section 33-12-40 guarantees to the defendant a trial anew. It is not an appeal as such term is normally understood where the appellate court reviews the record of the case to determine whether or not the proper rules of law and rules of evidence were followed. The action is tried anew without regard to what disposition or evidence was produced at the trial in the first instance.

Bail is basically controlled by constitutional and statutory provisions and is primarily intended to assure the court that the individual will appear at the proper time and place for the trial. With reference to an appeal from a municipal court to the district court, section 33-12-34 provides amongst other things that the defendant is required to give bail for his appearance in district court as prescribed by chapter 33-12. Section 33-12-36 provides as follows:

"BAIL - AMOUNT - TERMS. In an appeal in a criminal action, bail must be given in the sum fixed by the justice to the effect that the defendant shall appear in the district court on the first day of the next term convening within the county there to answer the complaint and abide the further orders of the court. The bail may be given by the written undertaking of one or more sufficient sureties approved by the justice, or by a deposit of money in lieu of sureties." (Emphasis added.)

It is thus observed that the court from which the appeal is taken is allowed discretion as to the amount set for bail. Chapter 33-12 does not specifically provide for the disposition of the bail money in the event there is a forfeiture.

Section 40-11-13 provides that:

"All fines, penalties, and forfeitures collected for offenses against the ordinances of a municipality shall be paid into its treasury at such time and in such manner as may be prescribed

by ordinance."

This section, however, appears to cover situations where bail is set for an appearance before the municipal court and does not cover situations where an appeal has been taken after conviction. The bail in this instance was for guaranteeing the appearance before the district court and not the municipal court. Both Volume 8 Am. Jur.2d., BAIL, Section 90, page 834, and Volume 8 CJS, BAIL, Section 109, page 306, substantially state that the forfeiture of the bail or the money deposited in lieu of bail is controlled by statute and deposited in certain funds according to the statutory provisions.

Section 29-08-21 amongst other things provides that:

"* * * After the forfeiture, the state's attorney must proceed by action against the bail jointly or severally upon the undertaking so forfeited. If money instead of bail is forfeited, the clerk of the court or other officer with whom it is deposited, immediately after the final adjournment, or at such time as the court may direct, must pay over the money deposited to the county treasurer."

This section, of course, contemplates procedures before the district court. Section 12-01-13 relates to the disposition of fines, forfeitures and pecuniary penalties for violation of State law. The instant question is concerned with a violation of a municipal ordinance.

As to using bail money, 8 Am. Jur.2d., BAIL, Section 91, page 835, seems to indicate that if the statutes so provide, bail money deposited may be applied against a fine and costs. However, we have not statute which seems to suggest that bail money may be used to pay the fine.

We must recognize that the fine is a judgment of the municipal court in this instance and the bail was to guarantee appearance before the district court. The fact that the judgment was affirmed by the district court because of nonappearance does not of itself alter the purpose of the bail. The affirming of the judgment by the district court merely affirms the fine which was imposed by the municipal court. The collection of such fine still remains with the municipal court. The bail furnished which was forfeited on nonappearance which guaranteed the appearance before the district court pursuant to section 29-08-21 is to be deposited with the county treasurer.

We recognize that this is an area which needs some clarifying legislation. If the municipal court were authorized to require surety to adequately cover the fine imposed and costs for nonappearance, it is conceivable that the bail which is forfeited as a result of nonappearance could be distributed in accordance with the terms of the bail given. However, under such arrangement the municipal court would be required to set the bail in an amount sufficient to cover both the fine and the guarantee of appearance. We recognize that the statutes do not specifically provide for such procedure; nevertheless, such procedure would be compatible with due process and would assure that each governmental body would receive its appropriate funds. However, in the absence of such procedure and

specifically because of the absence of a statute directing otherwise we must give considerable weight to section 29-08-21.

On such basis it is our opinion that the bail furnished by the defendants which was given to assure appearance in district court resulting from their appeal to the district court from the municipal court is forfeited to the district court in the event of not appearance and must be deposited with the county treasurer. The affirmation by the district court of the judgment made by the municipal court does not on its own authorize or permit the use of bail money for the payment of the fine. The municipal court or the City may institute any appropriate action to collect the fine imposed by the court.

HELGI JOHANNESON

Attorney General